

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL ANTHONY MILLER,

Plaintiff,

No. CIV S-04-2509 MCE KJM P

vs.

ARNOLD SCHWARZENEGGER, et al.,

ORDER AND

Defendants.

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se with an action for violation of civil rights under 42 U.S.C. § 1983. On November 21, 2005, plaintiff was ordered to pay the \$150.00 filing fee then in effect for this action within twenty days and was warned that failure to do so would result in a recommendation that this action be dismissed.¹ Plaintiff has not paid the filing fee for this action. In light of the foregoing, the court will deny all outstanding motions and recommend that this action be dismissed.

¹ On December 7, 2005, plaintiff filed “objections” to this order. In essence, plaintiff asserts that he has not “struck out” under 28 U.S.C. § 1915(g) and therefore he should not be required to pay the filing fee before continuing. The court has reviewed plaintiff’s objections. The objections are not well taken as plaintiff still fails to show—as he did in his response to the court’s October 20, 2005 order to show cause—that exhibits B, C, D and E attached to the motion to dismiss (docket #15) filed in case number CIV-S-03-1270 do not provide a basis for finding that plaintiff has struck out. Plaintiff does not even argue that the four cases referenced in those exhibits do not provide a basis for finding that plaintiff has “struck out.”

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's April 13, 2005 "motion for a temporary restraining order and preliminary injunction" is denied;
2. Plaintiff's August 29, 2005 "request for ruling on pending matters. . ." is denied; and
3. Plaintiff's February 8, 2006 "request for the court to take judicial notice"² is denied.

IT IS HEREBY RECOMMENDED that this action be dismissed.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fifteen days after being served with these findings and recommendations, plaintiff may file written objections with the court. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: March 13, 2006.


UNITED STATES MAGISTRATE JUDGE

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² Plaintiff requests that the court take judicial notice of his voluntary dismissal of CIV-S-03-1270. Even if the court were to take such notice, the voluntary nature of that dismissal does not alter the conclusion that plaintiff previously struck out based on the cases relied on in defendants' motion to dismiss in the voluntarily dismissed case.